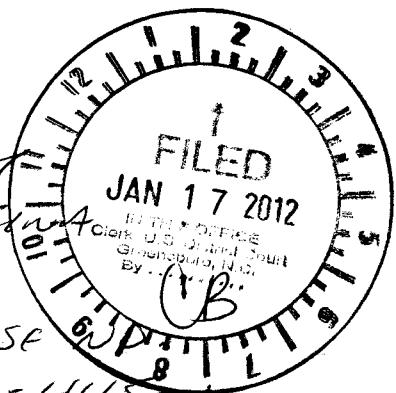


UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA



UNITED STATES OF AMERICA, *
RESPONDENT
VS.

CRIM. CASE NO.
1:03-cr-445

MAJOR BOYS WHITLEY, *
MOVANT

CIVIL CASE NO.

MEMORANDUM IN SUPPORT OF
MOVANT'S 28 U.S.C. § 2255 MOTION

COMES NOW MAJOR BOYS WHITLEY, HEREIN AFTER
"MOVANT", IN PRO-SE, AND RESPECTFULLY OFFERS THIS,
MEMORANDUM IN SUPPORT OF HIS 2255 MOTION.

INTRODUCTION

THIS IS A COLLATERAL ATTACK OF A FEDERAL CON-
VICTION. MOVANT WAS CONVICTED FOR VIOLATIONS 18 U.S.C.
§ 922(g)(1) FELON IN POSSESSION OF FIREARM.

JURISDICTION

A 2255 CHALLENGE TO AN ILLEGAL SENTENCE CANNOT
BE WAIVED; ONE WHO IS ACTUALLY INNOCENT OF CAREER
CRIMINAL MAY ALWAYS CHALLENGE THE ILLEGAL SENT-
ENCE, SEE U.S. v. MAYBECK, 23 F.3d 888 (7th Cir 1994).

STATEMENT OF FACTS

MOVANT WAS INDICTED FOR VIOLATION UNDER 18 U.S.C. § 922(g)(1), FELON IN POSSESSION OF A FIRE ARM.

THE PROBATION OFFICER APPLIES CHAPTER FOUR ENHANCEMENTS AND HELD MOVANT TO FIT THE CRITERIA OF ENHANCED PENALTIES PROVIDED BY 18 USC 924(e), ARMED CAREER CRIMINAL ACT, RELYING UPON (2) RELATED BURGLARY CONVICTIONS THAT THE COURT CONSOLIDATED FOR SENTENCING WHICH IS IDENTIFIED IN THE PSR REPORT PAGE 6 PARAGRAPH 21. SEE (ATTACHED) (EXHIBIT A)

IN THIS CASE THE ONLY OBJECTIONS TO THE PSR REPORT WERE MADE BY MOVANT. SEE (TRANSCRIPT OF SENTENCING HEARING AT 7-17)

NO OBJECTIONS TO THE PSR WERE MADE BY APPOINTED COUNSEL. THE SENTENCING COURT OVERRULED MOVANT'S OBJECTIONS AND ON MAY 28, 2004 MOVANT WAS SENTENCED TO A TOTAL OF 180 MONTHS.

APPOINTED COUNSEL'S FAILURE TO OBJECT TO THE (2) RELATED BURGLARY CONVICTIONS IN THE PSR'S CRIMINAL HISTORY CALCULATION DENIES MOVANT THE EFFECTIVE ASSISTANCE OF COUNSEL.

MINDFUL OF THE LIBERAL RULES APPLIED TO PROSECUTIONS MOVANT RESPECTFULLY ARTICULATES HIS BELIEF THAT HE HAS SUFFERED THE DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL.

ARGUMENT

1). APPOINTED COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE (ACCA) ENHANCEMENT RELATING ON (2) RELATED STATE BURGLARY PRIOR CONVICTIONS.

APPOINTED COUNSEL ERRED IN FAILING TO OBJECT TO THE PSR RELIANCE ON (2) RELATED STATE BURGLARY PRIOR CONVICTIONS.

MOVANT'S CRIMINAL HISTORY WAS IMPROPERLY COMPUTED UNDER THE U.S. SENTENCING GUIDELINES MANUAL § 4A1.2 COMMENTARY APPLICATION NOTE(3), BECAUSE THE (2) PRIOR BURGLARY CONVICTIONS WERE "RELATED" FOR SENTENCING PURPOSES. SEE (ATTACHMENT EXHIBIT B) (TRANSCRIPT OF PLEA, QUESTION # 14); SEE ALSO UNITED STATES V. RIVERS, 929 F.2d 134, 139-40 (4th Cir 1991) (UNLESS THERE ARE INTERVENING ARRESTS, CASES ARE RELATED IF THEY RESULTED FROM OFFENSES THAT (1) OCCURRED ON THE SAME OCCASION (2) WERE PART OF A COMMON SCHEME OR PLAN, OR (3) WERE CONSOLIDATED FOR TRIAL OR SENTENCING).

APPOINTED COUNSEL'S REPRESENTATION FEEL BELOW THE "RANGE OF COMPETENCE DEMANDS FOR ATTORNEYS" WHEN HE FAILS TO CHALLENGE THE PSR'S COMPUTATION OF MOVANT'S CRIMINAL HISTORY PURSUANT TO THE U.S. SENTENCING GUIDELINES MANUAL § 4A1.2 COMMENTARY, APPLICATION NOTE 3. PRIOR SENTENCES IMPOSED IN RELATED CASES ARE TO BE TREATED AS ONE SENTENCE FOR PURPOSES OF CRIMINAL HISTORY, U.S.S.G.

§ 4A1.2 (a) (z).

HERE, WHERE THE (z) PRIOR BURGLARIES WERE CONSIDERED FOR SENTENCING, APPOINTED COUNSEL SHOULD HAVE OBJECTED THAT MOVANT'S PRIORS ARE RELATED CASES AND ARE TO BE TREATED AS ONE SENTENCE FOR PURPOSES OF CRIMINAL HISTORY. IN THE WORDS OF JUDGE GASTER-BROOK, AN OBJECTION ON THIS GROUNDS WAS CLOSE TO A "DEAD-BANG WINNER!" PAGE V. U.S., 884 F.2d 300, 301 (7th Cir 1989).

THE FAILURE TO OBJECT TO THE CALCULATION ERROR WAS A EGAR LAUSE IN REPRESENTATION. SEE U.S. V. DAY, 969 F.2d 39, 43 (3rd Cir 1992) ("BECAUSE THE SENTENCING GUIDELINES HAVE BECOME A CRITICAL ... FACET OF FEDERAL CRIMINAL PROCEEDINGS ... FAMILIARITY WITH THE STRUCTURE AND BASIC CONTENT OF THE GUIDELINES ... HAS BECOME A NECESSITY FOR COUNSEL WHO SEEK TO GIVE EFFECTIVE REPRESENTATION"). SEE ALSO JACKSON V. LEONARDO, 162 F.3d 81, 86 (2nd Cir 1998) ("WHERE THERE IS NO PLAUSIBLE EXPLANATION FOR COUNSEL'S ERROR, NO HEARING IS REQUIRED TO DETERMINE THAT COUNSEL'S REPRESENTATION WAS DEFICIENT").

MOVANT WAS PREJUDICED BY TRIAL COUNSEL'S LAPSE IN REPRESENTATION, BECAUSE HE WOULD HAVE BEEN SENTENCED TO A PERIOD OF INCARCERATION LESS THAN 180 MONTHS AND WELL BELOW THE MANDATORY MINIMUM OF (ACCA). THEREFORE, MOVANT WAS PREJUDICED BY HIS ATTORNEY'S FAILURE TO OBJECT TO THE SENTENCING CALCULATION ERROR. SEE GLOUCE V. U.S., 531 U.S. 198, 203 (2001) ("HOLDING THAT "ANY INCREASE IN THE AMOUNT

OF ACTUAL JAIL TIME" DUE TO SENTENCING GUIDE LISTS
ERROR, CONSTITUTES PREJUDICE UNDER THE STRICKLAND
DOCTRINE).

FOR THE REASONS STATED ABOVE, THIS COURT SHOULD
HOLD THAT COUNSEL'S FAILURE TO OBJECT TO A SENTENCING
CALCULATION ERROR THAT RESULTS IN AN INCREASE IN
MOVANT'S PERIOD OF INCARCERATION CONSTITUTES IN-
EFFECTIVE ASSISTANCE OF COUNSEL.

DATED ON THIS 11th DAY OF ^{January} ~~January~~, 2012.

RESPECTFULLY SUBMITTED
BY MWP Whitley
MAJOR BOYS WHITLEY
22096 - 057
U.S. PENITENTIARY
P.O. BOX 1000
LEWISBURG, PA 17837

EXHIBIT A

MAJOR BOYD WHITLEY

PAGE 6

PART B. DEFENDANT'S CRIMINAL HISTORY

Juvenile Adjudications

20. None known.

Adult Criminal Convictions

| | Date of <u>Arrest</u> | Conviction/Court | Date Sentence <u>Imposed/Disposition</u> | <u>Guideline</u> | Pnt |
|-----|--------------------------|--|--|-------------------------|-----|
| 21. | 10/28/94 (Age 14) | <ul style="list-style-type: none"> * 1) Felony Second Degree Burglary, * 2) Felony Larceny, Docket No. 94CRS 14067, * 3) Felony Second Degree Burglary, Docket No. 94CRS 14068, * 4) Felony Larceny, Docket No. 94CRS 14069, Cabarrus County Superior Court, Concord, NC | <p><u>01/10/95:</u> <u>Consolidated for</u> * <u>judgement, 12 to 15</u> months imprisonment, suspended, 3 years supervised probation, pay \$350.00 fine and \$90.00 cost of court.</p> <p><u>07/12/95:</u> Probation violation. Probation modified and extended until January 9, 1999, complete 6 months intensive probation, 72 hours of community service, and complete 180 days electronic monitoring.</p> <p><u>08/14/95:</u> Probation revoked. Serve 12 to 15 months imprisonment, credit for 15 days imprisonment.</p> <p><u>09/28/96:</u> Discharged.</p> | 4A1.1(a) 4A1.2(d)(1) | 3 |

*All (4) was
Consolidated
on
10-10-95*

Defendant Whitley was initially charged by a juvenile petition (94 J 31). On October 19, 1994, the court ordered that Defendant Whitley be held in the Gaston Regional Detention Center, Gastonia, NC, until his hearing, which was set for October 28, 1994.

STATE OF NORTH CAROLINA

Cabarrus County

94 CRS 14067
94 CRS 14068
94 CRS 14069In The General Court Of Justice
District Superior Court Division

File No.

STATE VERSUS

Name Of Defendant

Major Boyd Whitley

DOB: 6-13-80

Age: 14

Highest Level Of Education Completed: 7th

TRANSCRIPT OF PLEA

G.S. 15A-1022

The defendant, having offered a plea of guilty and being first duly sworn, makes the

following answers to the questions set out below:

1. Are you able to hear and understand me? Yes
2. Do you understand that you have the right to remain silent and that any statement you make may be used against you? Yes
3. At what grade level can you read and write? Yes
4. (a) Are you now under the influence of alcohol, drugs, narcotics, medicines, pills, or any other intoxicants? No
(b) When was the last time you used or consumed any such substance? Yes
5. Have the charges been explained to you by your lawyer, and do you understand the nature of the charges, and do you understand every element of each charge? Yes
6. (a) Have you and your attorney discussed the possible defenses, if any, to the charges? Yes
(b) Are you satisfied with your lawyer's legal services? Yes
7. (a) Do you understand that you have the right to plead not guilty and be tried by a jury? Yes
(b) Do you understand that at such trial you have the right to confront and to cross examine witnesses against you? Yes
(c) Do you understand that by your plea(s) you give up these and your other constitutional rights relating to a trial by jury? Yes
8. Do you understand that, if you are not a citizen of the United States of America your plea(s) of guilty or no contest may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law? Yes
9. (If applicable) Do you understand that upon conviction of a felony that you automatically forfeit any licensing privileges as defined by G.S. 15A-1331A for the full term? Yes
10. Do you understand that you are pleading (guilty) (no contest) to the following charges, which carry the total punishments listed below? Yes

| Plea (Guilty No Contest) | Offense(s) | G.S. No. | F/M | Class | Maximum Punishment |
|--------------------------------|---------------|----------|-----|-------|-----------------------|
| G | Indl Dsg Burg | 14-51 | F | G | 16 months |
| G | (7) Larceny | 14-7262 | F | H | 8 months |
| G | Indl Dsg Burg | 14-51 | F | G | 16 months |
| G | 7 Larceny | 14-7261 | F | H | 8 months |
| | | | | | |
| | | | | | |

TOTAL MAXIMUM PUNISHMENT

48 mos

MANDATORY MINIMUM FINES & SENTENCES (if any)

Shows Consolidation *

- Answers
11. Do you now personally plead (guilty) (no contest)? Yes
12. (a) (If applicable) Are you in fact guilty? Yes
(b) (If applicable) Do you understand that upon your plea of no contest you will be treated as being guilty whether or not you admit your guilt? X
(c) (If applicable) (Afford plea)
(1) Do you now consider it to be in your best interest to plead guilty? Yes
(2) Do you understand that upon your "Afford Plea" you will be treated as being guilty whether or not you admit that you are in fact guilty? X
13. Have you agreed to plead as part of a plea arrangement? Before you answer, I advise you that the Courts have approved plea negotiating, and if there is such, you may advise me truthfully without fear of incurring my disapproval? ✓ Yes
14. (If applicable) The District Attorney and your lawyer have informed the Court that these are all the terms and conditions of your plea: That upon my plea all cases will be consolidated for judgement and I will receive a suspended sentence as provided by statute & sentencing act.
- (a) Is this correct as being your full plea arrangement? Yes
(b) Do you now personally accept this arrangement? Yes
15. (Other than the plea arrangement between you and the prosecutor) has anyone made any promises or threatened you in any way to cause you to enter this plea against your wishes? No
16. Do you enter this plea of your own free will, fully understanding what you are doing? Yes
17. Do you have any questions about what has just been said to you or about anything else connected with your case? No

I have read or have heard all of these questions and understand them. The answers shown are the ones I gave in open court and they are true and accurate. Neither my lawyer nor anyone else has told me to give false answers in order to have the Court accept my plea in this case. The conditions of the plea as stated above, if any, are accurate.

True

| | | |
|--|-----------------------------------|---------------------------------|
| SWEORN AND SUBSCRIBED TO BEFORE ME | | Date |
| Date | Signature | Signature Of Defendant |
| 1-10-95 | <i>James Walker</i> | <i>James Walker (Signature)</i> |
| <input checked="" type="checkbox"/> Deputy CSC <input type="checkbox"/> Assistant CSC <input type="checkbox"/> Clerk Of Superior Court | Name Of Defendant (Type Or Print) | |

| | | |
|---------------------------------------|-----------------------------------|--|
| CERTIFICATION BY LAWYER FOR DEFENDANT | | |
| Date | Signature Of Lawyer For Defendant | |
| 1-10-95 | <i>James Walker</i> | |

As lawyer for the defendant named above, I hereby certify that the conditions stated above, if any, upon which the defendant's plea was entered are correct and they are agreed to by the defendant and myself. I further certify that I have fully explained to the defendant the nature and elements of the charge(s) to which he is pleading.

| | | |
|------------------------------------|--------------------------------|--|
| CERTIFICATION BY DISTRICT ATTORNEY | | |
| Date | Signature Of District Attorney | |
| 1-10-95 | <i>James Walker</i> | |

As District Attorney for this Prosecutorial District, I hereby certify that the conditions stated above, if any, are the terms agreed to by the defendant and his/her lawyer and myself for the entry of the plea by the defendant to the charge(s) in this case.

| | | |
|--|--|--|
| PLEA ADJUDICATION | | |
| Upon consideration of the record proper, evidence presented, answers of defendant, and statements of the lawyer for the defendant and the District Attorney, the undersigned finds: | | |
| <ol style="list-style-type: none"> 1. That there is a factual basis for the entry of the plea. 2. That the defendant is satisfied with his/her lawyer. 3. That the defendant is competent to stand trial and that the plea is the informed choice of the defendant and is made freely, voluntarily and understandingly. | | |
| The defendant's plea is hereby accepted by the Court and is ordered recorded. | | |

| | |
|---------|------------------------------|
| Date | Signature Of Presiding Judge |
| 1-10-95 | <i>James Walker</i> |

ADC-CR-300, Seite Two
Rev. 5/84

ShowS NO prior record

246-33-23-76

STATE OF NORTH CAROLINA
Cabarrus County Concord

File No.
94CRS 14067, 14068, 14069

Seal Of Court In The General Court Of Justice
Superior Court Division

NOTE: This form is to be used for (1) felonies offenses(s), and (2) misdemeanor offenses(s), which are
Imprisoned for offenses with one felony offense(s). Use AOC-CR-310 for DWI offense(s).

STATE VERSUS

JUDGMENT SUSPENDING SENTENCE - FELONY

Defendant
Major Boyd Whitley

- IMPOSING AN INTERMEDIATE PUNISHMENT
 IMPOSING A COMMUNITY PUNISHMENT
(STRUCTURED SENTENCING)

Race Sex DOB
Black Male 6-23-80

G.S. 15A-1341, -1342, -1343, -1343.2, -1344

Attorney For State
Darrin Jordan

Def. Found Del Waived
 Not Indigent Attorney

Attorney For Defendant
Jim Johnson

Appointed Retained

The defendant pled guilty to: was found guilty by a jury of: pled no contest to:

File No (s) And Offense(s)

94CRS 14067 - 2nd Degree Burglary
Larceny

| Date Of Offense | O.S. No. | F.M. | C.L. |
|-----------------|-------------|------|------|
| 10-18-94 | 14-51 | F | G |
| | 14-72(b)(2) | F | H |
| 10-16-94 | 14-51 | F | G |
| 10-16-94 | 14-72(b)(2) | F | H |

94CRS 14068 - 2nd Degree Burglary

94CRS 14069 - Larceny

The Court:

1. has determined, pursuant to G.S. 15A-1340.14, the prior record points of the defendant to be 0. * PRIORITY RECORD LEVEL: I III V
 2. makes no prior record level finding because none is required. II IV VI

The Court:

1. makes no written findings because the prison term imposed is within the presumptive range of sentences authorized under G.S. 15A-1340.17(c).
 2. makes the Findings of Aggravating and Mitigating Factors set forth on the attached AOC-CR-605.
 3. makes the Findings of Extraordinary Mitigation set forth on the attached AOC-CR-606.
 4. finds the defendant has provided substantial assistance pursuant to G.S. 90-95(h)(5).
 5. finds enhanced punishment from a Class 1 misdemeanor to a Class 1 felony. G.S. 90-95(e)(3) (drugs); G.S. 14-3(c) (race).
 6. imposes the punishment pursuant to a plea arrangement as to sentence under Article 58 of G.S. Chapter 15A.

The Court, having considered evidence, arguments of counsel and statement of defendant, finds that the defendant's plea was freely, voluntarily, and understandingly entered, and Orders the above offenses be consolidated for judgment and the defendant be imprisoned

for a minimum term of: 12 months for a maximum term of: 15 months in the custody of the N.C. DOC.

The defendant shall be given credit for 0 days spent in confinement prior to the date of this Judgment as a result of this charge(s), to be applied toward the sentence imposed above. imprisonment required for special probation below.

SUSPENSION OF SENTENCE

With the consent of the defendant and subject to the conditions set out below, the execution of this sentence is suspended and the defendant is placed on supervised unsupervised probation for 3 years months.

1. The Court finds that a longer shorter period of probation is necessary than that which is specified in G.S. 15A-1343.2(f).
 2. The Court delegates to the Division of Adult Probation and Parole in the Department of Correction the authority to impose any of the requirements in G.S. 15A-1343.2(e) if the offender is sentenced to a community punishment, or G.S. 15A-1343.2(f) if the offender is sentenced to an intermediate punishment.
 3. The above period of probation shall begin when the defendant is released from incarceration in the case referred to below.
 4. The above period of probation shall begin at the expiration of the sentence in the case referred to below.
(NOTE: List case number, date, county and court in which prior sentence imposed.)

MONETARY CONDITIONS

The defendant shall pay to the Clerk of Superior Court the "Total Amount Due" shown below, plus the probation supervision fee set by law pursuant to a schedule determined by the probation officer, at the rate of \$ 20.00 per month beginning on 2-10-95 and continuing on the same day of each month thereafter until paid in full.
 Other: Supervision fee waived; Subject is 14 years old.

| Fine | Costs | Restitution* | Attorney's Fee | Community Service Fee | Total Amount Due |
|-----------|----------|--------------|----------------|-----------------------|------------------|
| \$ 350.00 | \$ 90.00 | \$ | \$ | \$ | \$ 440.00 |

*Name(s), address(es), phone(s) & serial account no(s) of approved party(ies) to receive restitution.

- After payment of community service fee and probation supervision fee, all payments received by the Clerk shall first be disbursed and then paid to the persons entitled to restitution. (G.S. 7A-304(d))
 Upon payment of the "Total Amount Due", the probation officer may transfer the defendant to unsupervised probation.

Material opposite unmarked squares is to be disregarded as surplusage.

(Over)

AOC-CR-603, Rev 10/94

